

## Boston College Journal of Law & Social Justice

Volume 36

Issue 3 *Electronic Supplement*

Article 2

April 2016

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### Recommended Citation

Kayla Acklin, “Slurring” the Lines Between Insensitivity and Hostility: *Boyer-Liberto v. Fontainebleau Corp.* and the Evaluation of Title VII Racial Harassment Claims, 36 B.C.J.L. & Soc. Just. E. Supp. 1 (2016), <http://lawdigitalcommons.bc.edu/jlsj/vol36/iss3/2>

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# “SLURRING” THE LINES BETWEEN INSENSITIVITY AND HOSTILITY: *BOYER- LIBERTO v. FONTAINEBLEAU CORP.* AND THE EVALUATION OF TITLE VII RACIAL HARASSMENT CLAIMS

KAYLA ACKLIN\*

**Abstract:** On May 7, 2015, the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, held in favor of Reya C. Boyer-Liberto, an African American cocktail waitress employed by defendant Fontainebleau Corporation, who claimed racial harassment in violation of Title VII by fellow employee, Trudi Clubb. In *Boyer-Liberto v. Fontainebleau Corp.*, the majority based its analysis on Clubb’s use of a racial epithet, twice in a twenty-four hour period, which they determined was severe or pervasive enough to create a racially hostile work environment, even in isolation. The separate concurring and dissenting opinions emphasized the majority’s departure from precedent established in *Harris v. Forklift Systems, Inc.* and *Faragher v. City of Boca Raton*. Both the concurrence and dissent were concerned that the majority’s decision would increase segregation in the workplace, which would be counter-productive to Title VII’s purpose, and would lead to an increase in frivolous employment litigation.

## INTRODUCTION

In 2015, the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, vacated the U.S. District Court for the District of Maryland’s decision to grant summary judgment in favor of Fontainebleau Corporation on hostile work environment and retaliation claims based on racial harassment.<sup>1</sup> In *Boyer-Liberto v. Fontainebleau Corp.*, Reya C. Boyer-Liberto, an African American cocktail waitress employed by defendant Fontainebleau Corporation (“Fontainebleau”), brought a claim after experiencing an incident of racial harassment at the Clarion Resort Fontainebleau Hotel (“Clarion”) where she was employed.<sup>2</sup> Boyer-Liberto’s claim of racial harassment was based on a twenty-four hour period during which she was called a “porch

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\* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2015–2016.

<sup>1</sup> *Boyer-Liberto v. Fontainebleau Corp. (Boyer-Liberto III)*, 786 F.3d 268, 268 (4th Cir. 2015) (en banc) (vacating the award of summary judgment and remanding to district court).

<sup>2</sup> *Id.*

monkey” twice and threatened with termination of her job by Trudi Clubb, a Caucasian Food and Beverage Manager at the Clarion.<sup>3</sup>

After she reported the harassment to management, Boyer-Liberto was terminated from her position at the hotel.<sup>4</sup> Then, after exhausting her administrative remedies with the Equal Employment Opportunity Commission (EEOC), Boyer-Liberto filed a complaint in the U.S. District Court for the District of Maryland, alleging hostile work environment and retaliation pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. section 1981 (“section 1981”), which prohibits employment discrimination based on race.<sup>5</sup> Following discovery, Fontainebleau filed a motion for summary judgment, which the district court granted, and Boyer-Liberto appealed.<sup>6</sup>

A 2-to-1 panel decision, written by Judge Paul V. Niemeyer for the Fourth Circuit, affirmed the district court’s judgment.<sup>7</sup> The Fourth Circuit, upon granting a rehearing en banc, ultimately vacated the district court’s decision, remanding for further proceedings.<sup>8</sup> The concurring and dissenting opinion of Judge J. Harvie Wilkinson III argued that the majority’s hostile work environment conclusion was without precedent but that the retaliation claim should be remanded.<sup>9</sup> Judge Niemeyer’s dissent argued that the

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<sup>3</sup> *Id.* On two occasions Clubb berated Boyer-Liberto, persistently shouting in close proximity to Boyer-Liberto’s face, threatening her by saying, “I’m going to make [you] sorry.” *Id.* at 269–70.

<sup>4</sup> *Id.* at 268. In Boyer-Liberto’s first attempt to report the harassment, Clubb interrupted the meeting by claiming that she was more important than the Clarion’s Food and Beverage Director, thereby effectively preventing Boyer-Liberto from completing her complaint. *Id.* at 270.

<sup>5</sup> 42 U.S.C. § 2000e-2(a)(1) (2012); 42 U.S.C. § 1981 (2012); *Boyer-Liberto III*, 786 F.3d at 271. “Section 1981” is the general code provision establishing equal rights under the law, which, when applied to employment situations, establishes the same test as 42 U.S.C. § 2000e-2(a)(1) for hostile work environment claims. 42 U.S.C. § 2000e-2(a)(1) (2008); 42 U.S.C. § 1981 (1988); *see Boyer-Liberto III*, 786 F.3d at 277.

<sup>6</sup> *Boyer-Liberto III*, 786 F.3d at 271, 274. The district court agreed with the defendants’ contention that Clubb’s conduct was not severe or pervasive enough to create a hostile work environment or support the belief that one was in progress. *Id.* at 274. Therefore, Boyer-Liberto’s racial harassment complaint was not a protected activity, and she was thereby not protected from retaliation. *Id.* at 271, 274, 275.

<sup>7</sup> *Boyer-Liberto v. Fontainebleau Corp. (Boyer-Liberto II)*, 752 F.3d 352, 352–53 (4th Cir. 2014).

<sup>8</sup> *Boyer-Liberto III*, 786 F.3d at 276. A majority of the judges in “regular active service” of the Fourth Circuit granted a rehearing en banc because a genuine issue of material fact existed as to whether the use of a racial slur by a supervisor, twice, was severe enough conduct to create a hostile work environment. *Id.*

<sup>9</sup> *Id.* at 293 (Wilkinson, J., concurring in part and dissenting in part). Judge Wilkinson argued that the majority was correct in allowing Boyer-Liberto’s retaliation claim to continue, but wrong in not affirming the district court’s grant of summary judgment on the Title VII claim because allowing such single, isolated incidents to be causes for Title VII claims would increase segregation in the workplace, and increase interracial distance among co-workers. *Id.*

court's conclusions were without precedent because they were based on a misinterpretation of the existing precedent.<sup>10</sup>

Part I of this Comment outlines the factual and procedural history of *Boyer-Liberto*. Part II discusses the majority's departure from previous standards of evaluation of Title VII hostile work environment and retaliation claims. Part III advocates for a return to precedent when evaluating Title VII hostile work environment and retaliation claims in order to avoid frivolous racial harassment claims filed against employers, and to maintain the purpose of Title VII in reducing workplace segregation and racial hostility.

#### I. BOYER-LIBERTO'S CLAIM OF RACIAL HARASSMENT IN THE WORKPLACE

In August 2010, Reya C. Boyer-Liberto began working in the Food and Beverage Department at the Clarion, an oceanfront hotel in Ocean City, Maryland.<sup>11</sup> Boyer-Liberto had various roles, including restaurant and banquet server, bartender, and cocktail waitress.<sup>12</sup>

On September 14, 2010, when Boyer-Liberto was working as a cocktail waitress in the nightclub, one of her customers ordered a "Hula Hula" drink, which the bartender in the main bar refused to fill.<sup>13</sup> In order to please her customer, Boyer-Liberto went behind the main bar to the pub bar where she found a bartender that would make a "Hula Hula."<sup>14</sup> Once the drink was prepared, to avoid confrontation with the main room bartender, Boyer-Liberto chose a new path back to the nightclub that took her through the restaurant kitchen.<sup>15</sup> After going to the server station to print a guest check, Boyer-Liberto was confronted by Trudi Clubb, who, unbeknownst to Boyer-Liberto, had been yelling at Boyer-Liberto as she passed through the

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<sup>10</sup> *Id.* at 293–94 (Niemeyer, J., dissenting). Judge Niemeyer argued that the majority's interpretation of cases including *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) was inaccurate and extended Title VII liability beyond the scope the Supreme Court had previously recognized. *Id.* at 297.

<sup>11</sup> *Boyer-Liberto v. Fontainebleau Corp. (Boyer-Liberto III)*, 786 F.3d 268, 269 (4th Cir. 2015) (en banc). The Clarion contained "guest rooms, several restaurants and bars, a nightclub, and a conference center with meeting and banquet facilities." *Id.*

<sup>12</sup> *Id.* Boyer-Liberto was told her assignments in these various roles were part of her training, as she had only been at the Clarion for seven weeks. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

kitchen.<sup>16</sup> Clubb's shouting escalated to threats, and concluded with Clubb calling Boyer-Liberto a "damn porch monkey."<sup>17</sup>

Upon arriving for the dinner shift the next day, Boyer-Liberto went to Clarion's management office to report Clubb's conduct.<sup>18</sup> Clubb interrupted the meeting and reprimanded Boyer-Liberto in a "raised and angry voice" for passing through the kitchen the previous night.<sup>19</sup> Clubb threatened to report Boyer-Liberto's misconduct to the hotel owner, and once again called Boyer-Liberto a "porch monkey."<sup>20</sup>

On a phone call with Human Resources Director Nancy Berghauer on September 17, 2010, Boyer-Liberto complained that Clubb had racially harassed her.<sup>21</sup> Boyer-Liberto's complaint included the allegation that Clubb had twice called her a "porch monkey."<sup>22</sup> Upon reviewing the complaint, Clarion's owner and General Manager advised Clubb that she needed to be cautious about using potentially derogatory or racist phrases.<sup>23</sup> According to Clarion's owner, the complaint prompted him to inquire about Boyer-Liberto's work performance.<sup>24</sup> After reviewing a negative work evaluation from Boyer-Liberto's supervisor, Clarion's owner terminated Boyer-Liberto's employment.<sup>25</sup>

In January 2012, after exhausting remedies with the Equal Employment Opportunity Commission (EEOC), Boyer-Liberto brought a Title VII claim based on race discrimination deriving from a hostile work environment against Fontainebleau Corp. in the U.S. District Court for the District

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<sup>16</sup> *Id.* at 269. Clubb initially decided to reprimand Boyer-Liberto because she had wrongfully passed through the kitchen, but continued because she believed Boyer-Liberto had heard her, but had ignored her. *Id.*

<sup>17</sup> *Id.* at 270. As Boyer-Liberto worked at the server station, Clubb continued yelling until she finally approached Boyer-Liberto, coming within inches of her face, spraying Boyer-Liberto with saliva as she yelled. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Clubb prevented Boyer-Liberto from detailing her complaint to management by leading Boyer-Liberto out of the management offices to nearby tables where she continued to threaten Boyer-Liberto's job. *Id.*

<sup>20</sup> *Id.* Boyer-Liberto did not know that Clubb held a manager title and did not consider Clubb to be her manager. *Id.* at 270–71. From Boyer-Liberto's perspective, Clubb was just a "glorified hostess." *Id.* at 270. Nonetheless, Boyer-Liberto felt "extremely singled out" by Clubb and perceived that "[her] position was being threatened by [Clubb]." *Id.* at 271.

<sup>21</sup> *Id.* at 270.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Clubb denied she had ever called Boyer-Liberto a "porch monkey." *Id.*

<sup>24</sup> *Id.* This was the first time ever that Clarion management had reviewed Boyer-Liberto's performance. *Id.* Clarion's review process includes reviewing evaluations from supervisors and consulting with both the General Manager and Human Resources about the employee. *See id.*

<sup>25</sup> *Id.* The Food and Beverage Director of the Clarion "gave a negative evaluation of Boyer-Liberto and attributed her variety of job assignments to failure" in each role she was given, rather than as a form of her training, which she was initially told was to enable her to learn all of the positions within the Food and Beverage Department. *Id.* at 269–70.

of Maryland.<sup>26</sup> Following discovery, the defendants filed a motion for summary judgment, arguing that Clubb's conduct was not severe or pervasive enough to create an abusive work environment and that Boyer-Liberto could not establish that she undertook a protected activity by making her racial harassment complaint to Clarion management.<sup>27</sup>

The U.S. District Court for the District of Maryland granted summary judgment, relying on precedent for the evaluation of hostile work environment and retaliation claims.<sup>28</sup> The court stated that "hostile work environments generally result only after an accumulation of discrete instances of harassment."<sup>29</sup> The district court ruled that an isolated racist comment would not create an environment of racial hostility that would alter the conditions of employment and would not give rise to the belief that a hostile work environment existed.<sup>30</sup>

A three-judge panel of the Fourth Circuit, led by Judge Niemeyer, unanimously confirmed the district court's judgment granting the defendants summary judgment for the hostile work environment claim.<sup>31</sup> The panel concluded that Clubb's use of the term "porch monkey" twice in a period of two days in regards to a single incident was not severe or pervasive enough "to change the terms and conditions of Boyer-Liberto's employment

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<sup>26</sup> *Id.* at 271. The original complaint asserted four claims: one claim each of hostile work environment and retaliation against Fontainebleau Corp. under Title VII, and one claim each of hostile work environment and retaliation against Fontainebleau Corp. and Clarion owner Dr. Leonard Berger under 42 U.S.C. § 1981. *Id.*

<sup>27</sup> *Id.* A protected activity, such as an internal complaint, is one in which an employee opposes either "employment actions actually unlawful under Title VII" or "employment actions [she] reasonably believes to be unlawful." *E.E.O.C. v. Navy Fed. Credit Union*, 424 F.3d 399, 406 (4th Cir. 2005). The defendant argued that Boyer-Liberto did not engage in a protected activity because she could not have reasonably believed that Clubb's conduct was severe or pervasive enough to create a prohibited hostile work environment. *Boyer-Liberto III*, 786 F.3d at 272.

<sup>28</sup> *Boyer-Liberto III*, 786 F.3d at 272. To determine whether an environment was sufficiently hostile or abusive, the courts look at all of the circumstances, including: (1) frequency of discriminatory conduct, (2) severity, (3) whether the conduct was physically threatening or humiliating, or a "mere offensive utterance," and (4) whether it unreasonably interfered with an employee's work performance. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (2013) (remanding to determine whether a reasonable person would perceive the work environment to be hostile); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998) (remanding case that held that simple teasing, offhand comments, and isolated incidents would not amount to discriminatory changes in employment).

<sup>29</sup> *Boyer-Liberto III*, 786 F.3d at 273 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)).

<sup>30</sup> *Boyer-Liberto v. Fontainebleau Corp. (Boyer-Liberto I)*, No. 1:12-cv-00212, 2013 WL 1413031 \*3 (D. Md. Apr. 4, 2013) *aff'd*, 752 F.3d 350 (4th Cir. 2014) *on reh'g en banc*, 786 F.3d 264 (4th Cir. 2015), *vacated*, 786 F.3d 264 (4th Cir. 2015) ("the two incidents of use of a racial epithet, assuming they occurred as Boyer-Liberto testified, simply do not comprise either pervasive or severe conduct, however unacceptable they are").

<sup>31</sup> *Boyer-Liberto II*, 752 F.3d at 353.

so as to be legally discriminatory.”<sup>32</sup> Following the issuance of the panel’s decision, Boyer-Liberto sought rehearing en banc, which the Fourth Circuit granted.<sup>33</sup>

## II. RACIAL HARASSMENT AND RETALIATION UNDER *BOYER-LIBERTO*

The Fourth Circuit, sitting en banc, determined that an issue of material fact existed as to whether Clubb’s use of a racial slur towards Boyer-Liberto, twice, was severe enough conduct to create a hostile work environment.<sup>34</sup> The Fourth Circuit also determined that Boyer-Liberto would be protected from retaliation for opposing an isolated incident of harassment when she reasonably believed that a hostile work environment was in progress.<sup>35</sup> The Fourth Circuit remanded to the district court to evaluate Boyer-Liberto’s hostile work environment and retaliation claims based on their interpretation of previous cases and Title VII claims.<sup>36</sup>

### A. *Racial Harassment Has No Business in the Workplace*

Under Title VII, it is “unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”<sup>37</sup> The Supreme Court in *Harris v. Forklift Systems, Inc.* ruled that Title VII is violated when a workplace is permeated with “discriminatory intimidation, ridicule, and insult” that are “severe or pervasive” enough to change the conditions of the victim’s employment and establish an abusive working environment.<sup>38</sup> This

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<sup>32</sup> *Id.* at 356. The court acknowledged that the term “porch monkey” was racially derogatory and highly offensive, and not condoned in light of their decision. *Id.*

<sup>33</sup> *Boyer-Liberto III*, 786 F.3d at 276.

<sup>34</sup> *Id.* at 285. The majority recognized the term “porch monkey” as not only humiliating, but also “degrading and humiliating in the extreme,” and severe enough to create a hostile work environment. *Id.* (quoting *Spriggs v. Diamond Auto Glass*, 242 F.3d 181, 185 (4th Cir. 2001)).

<sup>35</sup> *Id.* The majority viewed precedential standards for evaluation of hostile work environment and retaliation claims as standards that would deter harassment victims from speaking up about the harassment. *Id.* at 283.

<sup>36</sup> *Id.* at 288.

<sup>37</sup> 42 U.S.C. § 2000e-2(a)(1) (2012); see *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Such violation would include requiring an African American woman to work in a racially hostile environment. See *Harris*, 510 U.S. at 21.

<sup>38</sup> See *Harris*, 510 U.S. at 21 (involving a female, Teresa Harris, who worked at Forklift Systems, Inc. and was often insulted by company president, Charles Hardy, because of her gender, and was made the target of unwanted sexual innuendos). In order to establish a racially hostile working environment, a plaintiff has been required to show (1) unwelcome conduct, (2) that is based on the plaintiff’s race, (3) which is sufficiently severe or pervasive to alter the plaintiff’s

standard has traditionally required conduct that is more than “merely offensive.”<sup>39</sup> Further, a plaintiff is required to show that the environment would be perceived as hostile or abusive as judged from the perspective of a reasonable person in the plaintiff’s position.<sup>40</sup>

To determine when there is a racially hostile environment, courts look at the totality of the circumstances.<sup>41</sup> The very nature of a hostile work environment claim, therefore, often involves repeated conduct.<sup>42</sup> Isolated incidents of harassment can only amount to discriminatory changes in employment if extremely severe and conducted by a supervisor.<sup>43</sup> “Simple teasing,” offhand comments, and less serious isolated incidents would not satisfy a Title VII hostile work environment claim.<sup>44</sup>

In deciding *Boyer-Liberto v. Fontainebleau Corp.*, the court examined Clubb’s conduct in regards to the two incidents of racial harassment toward Boyer-Liberto.<sup>45</sup> The majority of the court viewed Clubb’s conduct as evidence that Boyer-Liberto reasonably believed that Clubb could make a discharge decision that would terminate Boyer-Liberto’s employment at the hotel.<sup>46</sup> In light of her status as a supervisor, the majority viewed Clubb’s harassment toward Boyer-Liberto as particularly threatening and severe in nature to create a hostile work environment.<sup>47</sup> In their conclusion, the ma-

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conditions of employment and to create an abusive work environment. *Boyer-Liberto III*, 786 F.3d at 277.

<sup>39</sup> *Harris*, 510 U.S. at 21. The Supreme Court has recognized that a “mere utterance” of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 23. Courts look at (1) the frequency of the discriminatory conduct, (2) its severity, (3) whether it is physically threatening or humiliating, or a “mere offensive utterance,” and (4) whether it unreasonably interferes with an employee’s work performance. *Id.*

<sup>42</sup> *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). Hostile or abusive conduct cannot, according to the Supreme Court, be measured in isolation. *Id.*

<sup>43</sup> *Boyer-Liberto III*, 786 F.3d at 277. The harasser qualifies as a supervisor rather than a co-worker if “he or she is empowered by the employer to take tangible employment actions against the victim.” *Id.* at 278.

<sup>44</sup> *See Faragher*, 524 U.S. at 788 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (Thomas, J., concurring)) (involving female ocean lifeguard, Beth Ann Faragher, whose immediate supervisors repeatedly subjected her to unwanted touching, lewd remarks, and offensive comments).

<sup>45</sup> *See Boyer-Liberto III*, 786 F.3d at 279. The court looked at the repeated communications with Boyer-Liberto, how Clubb openly admitted to “[having] Dr. Berger’s ear” and that she was more important than Boyer-Liberto’s direct supervisors, Boyer-Liberto’s concerns that her position was being threatened, and the general manager’s assertion of Clubb’s authority by calling her “boss.” *Id.* at 279–80.

<sup>46</sup> *Id.* at 280. The majority, led by Judge King, concluded that Clubb was a “supervisor” of Boyer-Liberto. *Id.*

<sup>47</sup> *Id.* The majority determined that the use of the phrase “porch monkey” was akin to “nigger,” and thereby held that “perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial



jority made clear that the use of a racial epithet by a supervisor, if determined to be severe or pervasive, even if used in isolation in regards to a single incident, could satisfy a Title VII racially hostile work environment claim.<sup>48</sup>

In his concurrence and dissent, Judge Wilkinson argued that the majority's standard for evaluating Title VII claims was too open-ended.<sup>49</sup> He advocated that an employer should be liable for a co-worker's unlawful harassment if the employer was negligent with respect to the offensive behavior, but not when the behavior was unprecedented and isolated to a single incident.<sup>50</sup> He expressed serious concern that the majority's decision would actually increase segregation in the workplace, which would be counterproductive to the purpose of Title VII.<sup>51</sup>

Judge Niemeyer, in a separate dissent, argued that the majority's conclusion was based on a misinterpretation and, therefore, was serious departure from precedent.<sup>52</sup> Specifically, Judge Niemeyer argued that the majority's standard did not reach the level of "severe or pervasive," but was more akin to the "merely offensive standard" rejected in *Harris*, which requires only that incidents of harassment offend an employee because of their race, color, religion, sex, or national origin.<sup>53</sup> In focusing their analysis on Clubb's use of a racial epithet only twice in a period of twenty-four hours, the dissent argued that the majority expanded Title VII beyond the scope in which it was intended.<sup>54</sup>

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epithet such as 'nigger' . . . ." *Id.* (quoting *Spriggs v. Diamond Auto Glass*, 242 F.3d 181, 185 (4th Cir. 2001)).

<sup>48</sup> *Id.* at 280–81. The majority's standard for determining whether a racial epithet is sufficiently severe or pervasive involves a subjective interpretation of the incident of harassment. *See id.*

<sup>49</sup> *See id.* at 289 (Wilkinson, J., concurring in part and dissenting in part).

<sup>50</sup> *Id.* Judge Wilkinson declined to hold an employer vicariously liable for actions of co-workers. *Id.*

<sup>51</sup> *Id.* at 292–93. Judge Wilkinson argued that the workplace is a place where racial interactions are most frequent, and stated that it would be unfortunate if the decision in *Boyer-Liberto* creates more "separatist habits" that are frequently prevailing in other venues such as schools and neighborhoods. *Id.* at 292.

<sup>52</sup> *Id.* at 293–94 (Niemeyer, J., dissenting). The dissent argued that in their examination of *Faragher*, the majority ignored the portion of the discussion requiring an examination of the totality of the circumstances when evaluating Clubb's conduct toward Boyer-Liberto. *Id.* at 294; *see Faragher*, 524 U.S. at 787–88 (citing *Harris*, 510 U.S. at 21–22, 23).

<sup>53</sup> *See Boyer-Liberto III*, 786 F.3d at 298. The Court in *Harris* rejected the "merely offensive standard" when evaluating a hostile work environment claim because it inadequately measures the effect of harassment on work conditions. *See Harris*, 510 U.S. at 22.

<sup>54</sup> *Boyer-Liberto III*, 786 F.3d at 297 (Niemeyer, J., dissenting). The dissent argued that a mere "lack of racial sensitivity does not, alone, amount to actionable harassment." *Id.* at 294. Clubb clearly demonstrated a lack of racial sensitivity, but Judge Niemeyer asserted that it was not evident that her single incident of harassment would lead to a racially hostile work environment. *Id.* at 305.

Judge Niemeyer also argued that the majority misinterpreted *Faragher v. City of Boca Raton* by reading the phrase “isolated incidents” to mean that a “single incident” could satisfy the severity requirement of the *Harris* standard if such incident was extremely severe or pervasive.<sup>55</sup> By failing to recognize the requirement of more than one incident of harassment that is severe or pervasive, the majority incorrectly determined that Clubb’s conduct satisfied a Title VII claim.<sup>56</sup>

### *B. Retaliation Following a Harassment Claim in the Workplace*

The Fourth Circuit in *Jordan v. Alternative Resources Corp.* determined that employees are protected from retaliation when they report to their supervisors about suspected violations of Title VII if they can prove that (1) they engaged in a protected activity; (2) that their employer took an adverse employment action against them; and (3) that there was a causal link between the two events.<sup>57</sup> The *Jordan* court ruled that an employee is protected from retaliation if, at the time of her complaint, she had “an objectively reasonable belief” that a Title VII violation had happened or was in progress.<sup>58</sup> Evidence that a Title VII violation had happened or was in progress usually occurs after there have been multiple incidents of harassment.<sup>59</sup>

The majority in *Boyer-Liberto* disagreed with the district court’s analogy to *Jordan*.<sup>60</sup> Instead, the majority determined that the proper standard

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<sup>55</sup> *Id.* at 294. The Court in *Faragher v. City of Boca Raton* specifically used the plural form of “incidents” to require the showing of more than one incident of harassment. *See id.* The dissent pointed out the majority’s failure to note lengthy portions of the *Faragher* decision in which the Court said that “mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not sufficiently alter the terms and conditions of employment to violate Title VII.” *Id.*; *see Faragher*, 524 U.S. at 787.

<sup>56</sup> *Boyer-Liberto III*, 786 F.3d at 294 (Niemeyer, J., dissenting). The dissent asserted that if the majority had correctly interpreted *Faragher*, they would have analyzed Clubb’s conduct to be more akin to a mere utterance of a racial epithet or a demonstration of racial insensitivity. *Id.* at 299.

<sup>57</sup> *E.E.O.C. v. Navy Fed. Credit Union*, 424 F.3d 399, 406 (4th Cir. 2005); *see Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 338–41 (4th Cir. 2006), *overruled by Boyer-Liberto III*, 786 F.3d 264 (ruling that a fellow employee using the phrase “black monkeys” did not create a racially hostile work environment despite being “unacceptably crude and racist” because it was an isolated response that did not alter the terms and conditions of the employee’s employment).

<sup>58</sup> *Jordan*, 458 F.3d at 340. The employee must be able to demonstrate that the conduct being objected to was likely to recur at such a level as to create a hostile work environment, and that the action was actually unlawful under Title VII. *See id.* at 339.

<sup>59</sup> *Id.* The court in *Jordan* required this standard for a retaliation claim to ensure that employees felt free to report harassment in the workplace, but did not turn simple socializing into grounds for a Title VII claim. *Id.* at 342.

<sup>60</sup> *See Boyer-Liberto III*, 786 F.3d at 281. The majority disputed the analogy because *Jordan* did not involve an incident of harassment by a supervisor, which the court viewed to be more severe than an incident by a fellow employee. *Id.* The majority further disagreed with *Jordan*

for analyzing retaliation claims based on isolated incidents of harassment was to focus on the severity of the harassment.<sup>61</sup> The majority held that an employee is protected from retaliation for challenging a single harassment incident when she reasonably believes that a hostile work environment exists, and that she is not required to show additional evidence that such an environment is likely to occur.<sup>62</sup> With this new standard, the court held that Boyer-Liberto reasonably believed a hostile work environment existed, and therefore concluded that Boyer-Liberto was protected from retaliation when she filed the Title VII claim.<sup>63</sup>

### III. THE THREAT OF RE-SEGREGATION IN THE WORKPLACE

*Boyer-Liberto v. Fontainebleau Corp.* is not about whether an employee should be allowed to call a fellow employee a “porch monkey,” because slurs like that clearly do not belong in the workplace.<sup>64</sup> Nor is it about whether an employee should report such an incident to workplace management.<sup>65</sup> At its core, *Boyer-Liberto* is about the standard for evaluation of Title VII racial harassment and retaliation claims and the majority’s serious departure from precedent established in *Harris v. Forklift Systems, Inc.* and *Faragher v. City of Boca Raton*.<sup>66</sup>

The majority’s decision in *Boyer-Liberto* effectively holds employers vicariously liable under Title VII for remarks made by one of their employees without requiring prior notice to the employer or prior awareness that an employee has racist tendencies.<sup>67</sup> By imposing employer liability for remarks made by mid-level workers in businesses that might include hundreds of employees, the majority is pushing liability far beyond the intended scope of Title VII.<sup>68</sup> Based on the majority’s decision, employees could find grounds to sue employers and will likely be successful on those suits when-

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because it ignored the possibility that a hostile work environment could develop without the intent to change the working conditions of African Americans through racial harassment, and thereby deterred harassment victims from speaking up. *Id.* at 282.

<sup>61</sup> *Id.* at 284. The majority focused on whether the isolated incident of discriminatory conduct was physically threatening or humiliating, or a mere offensive utterance. *Id.*

<sup>62</sup> *Id.* at 284–85.

<sup>63</sup> *Id.*

<sup>64</sup> *Boyer-Liberto III*, 786 F.3d at 295 (Niemeyer, J., dissenting).

<sup>65</sup> *Id.* It is not disputed that employees should feel protected enough to report incidents of harassment to management. *Id.* at 290 (Wilkinson, J., concurring in part and dissenting in part).

<sup>66</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Boyer-Liberto III*, 786 F.3d at 295 (Niemeyer, J., dissenting).

<sup>67</sup> See *Boyer-Liberto III*, 786 F.3d at 289 (Wilkinson, J., concurring in part and dissenting in part).

<sup>68</sup> See *id.* Liability under the majority’s standard essentially hinges upon utterance. See *id.* Judge Wilkinson pointed out that the courts cannot reasonably expect employers to censor everything their employees say. *Id.* at 289–90.

ever they can show that an employee of arguably higher rank offended them in some manner.<sup>69</sup> Consequentially, this decision will lead to frivolous widespread litigation resulting from any everyday workplace comment that an individual finds offensive or humiliating.<sup>70</sup>

This will likely lead to a devastating outcome of more segregated workplaces because employers may try avoiding liability by only hiring like individuals, thereby decreasing and potentially eliminating diversity in the workplace.<sup>71</sup> By allowing single isolated incidents of racial harassment to be grounds for Title VII claims, the majority is incentivizing employers to create only homogeneous work environments.<sup>72</sup> Employers may also choose to segregate employees into certain departments to avoid any potential clash of views, attitudes, and races that could lead to a lawsuit.<sup>73</sup> Title VII was established to encourage integration of the workplace, but with this decision that may no longer happen.<sup>74</sup>

The majority's decision in *Boyer-Liberto* also establishes a lower threshold for Title VII claims against individuals, which essentially does not tolerate any racially offensive behavior.<sup>75</sup> This low threshold will likely increase racial hostility and tension in the workplace because individuals will fear that any subjectively racial remarks made, even if innocent in nature, will amount to civil liability.<sup>76</sup> Employees may not know what to say or how to act amongst individuals of other races, and can in turn blame minority

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<sup>69</sup> See *id.* at 304–05 (Niemeyer, J., dissenting).

<sup>70</sup> See *id.* at 303–05. Judge Niemeyer argued that this decision will also raise too many questions about what counts as “offensive.” *Id.* at 304.

<sup>71</sup> See *id.* at 293 (Wilkinson, J., concurring in part and dissenting in part). The majority's decision about vicarious liability would effectively undo decades of integration in the workplace. See *id.*

<sup>72</sup> See *id.* at 292. Instead of an inclusive community in which individual characteristics can be “recognized, understood, celebrated, and embraced,” the result of the majority's decision will be to eliminate the risk of liability by “walling-off” the workplace to diversity. See *id.* at 293.

<sup>73</sup> See *Faragher*, 524 U.S. at 798. Judge Wilkinson argued that the majority's decision will push the workplace into the more separatist habits that prevail too frequently in other venues. See *Boyer-Liberto III*, 786 F.3d at 292 (Wilkinson, J., concurring in part and dissenting in part). This will likely raise other Title VII issues, as discrimination in hiring is itself a Title VII violation. 42 U.S.C. § 2000e-2(a)(1) (2012); 42 U.S.C. § 1981 (2012).

<sup>74</sup> *Boyer-Liberto III*, 786 F.3d at 292 (Wilkinson, J., concurring in part and dissenting in part). Judge Wilkinson asserted that “the objects of civil rights laws are to eliminate discrimination, bring Americans together, and break down barriers,” and yet with decisions such as that of the majority, schools and neighborhoods are re-segregating more than they are integrating. See *id.*

<sup>75</sup> See *id.* at 293 (Niemeyer, J., dissenting). Single isolated incidents, or mere utterances of any racially insensitive content, are not tolerated by the majority, and are thereby subject to civil liability. See *id.*

<sup>76</sup> See *id.* at 292 (Wilkinson, J., concurring in part and dissenting in part) (“There would be no single correct way to behave around, no single correct thing to say to, a worker of another race or gender.”).

workers for the anxiety felt in the workplace.<sup>77</sup> Racial minorities benefit from a higher threshold of allowable racial harassment because, by tolerating some offensive behavior, discussion of racial differences is encouraged and workplaces are able to become more integrated.<sup>78</sup> Rather than dismantling racial barriers in the workplace as Title VII was intended, the majority's decision will most likely establish new boundaries by eliminating communication among diverse employees.<sup>79</sup>

In regards to retaliation claims, the majority's standard departs from an "objectively reasonable standard" and makes ordinary socializing in the workplace actionable for discrimination claims.<sup>80</sup> Although it is true that employees should feel free to report harassment to upper level management without being subject to retaliation, Title VII should not be turned into a "general civility code."<sup>81</sup> Therefore, ordinary tribulations of the workplace, such as the occasional use of abusive language, gender related jokes, and teasing, should not become grounds for discrimination and harassment claims.<sup>82</sup> It would become too costly and it would be impossible for employers to regulate the conduct of their employees in an attempt to avoid liability under retaliation and Title VII claims.<sup>83</sup> The majority's decision in *Boyer-Liberto* is an outlier among other courts and extends Title VII liability far beyond both the statute's textual scope and what the Supreme Court has previously recognized.<sup>84</sup>

#### CONCLUSION

The Fourth Circuit in *Boyer-Liberto v. Fontainebleau Corp.* concluded that the use of a racial epithet twice in a twenty-four hour period in the workplace was so severe or pervasive that it satisfied a Title VII racially

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<sup>77</sup> See *id.* Judge Wilkinson argued that increasing interracial distance would become the easiest way to avoid a "blot on one's record." *Id.*

<sup>78</sup> See *id.* at 291–92. Re-segregating the workplace will limit the opportunity for racial minorities to find diverse employment. See *id.* at 292.

<sup>79</sup> See *id.* at 291–93. Judge Wilkinson remarks that "where every ambiguous or unintentionally insensitive remark is going to be reported upstairs, employees naturally will seek to cluster with those who look, act, and think 'like themselves.'" *Id.* at 293.

<sup>80</sup> See *id.* at 292. Judge Wilkinson emphasized that it is crucial to use an objectively reasonable standard to prevent simple offhand comments made by fellow employees in the workplace from becoming grounds for Title VII claims. *Id.* at 291.

<sup>81</sup> See *Faragher*, 524 U.S. at 788.

<sup>82</sup> See *id.* By making such remarks grounds for Title VII claims, the majority has established a work environment where individuals will be restricted from acting in a natural manner out of fear that they will inadvertently offend another employee and be liable for harassment. See *Boyer-Liberto III*, 786 F.3d at 293 (Wilkinson, J., concurring in part and dissenting in part).

<sup>83</sup> See *id.* at 290.

<sup>84</sup> See *id.* at 302–03 (Niemeyer, J., dissenting). Judge Niemeyer argued that the majority's ruling is, therefore, unprecedented and broader than is necessary. *Id.* at 304.

hostile work environment claim. By doing so, the court established a new standard for employer liability in which demonstration of a single incident of racial insensitivity could establish a hostile work environment claim under Title VII, as long as the employee believed such a hostile work environment existed. With no other evidence of workplace racism, the Fourth Circuit should have affirmed the decision of the district court that Trudi Clubb's conduct did not create a racially hostile work environment under Title VII.

The implications of the majority's decision are counterproductive to the purpose of Title VII. By holding individuals and employers liable for isolated racist remarks, the majority has effectively re-segregated the workplace, which will have consequences for other Title VII protected groups. Employees will not want to interact with employees of diverse backgrounds out of fear of lawsuits. Employers, in turn, will also limit the integration of their workplaces. It would be a shame to see decades' worth of integration wasted because of the decision of the court in *Boyer-Liberto*.